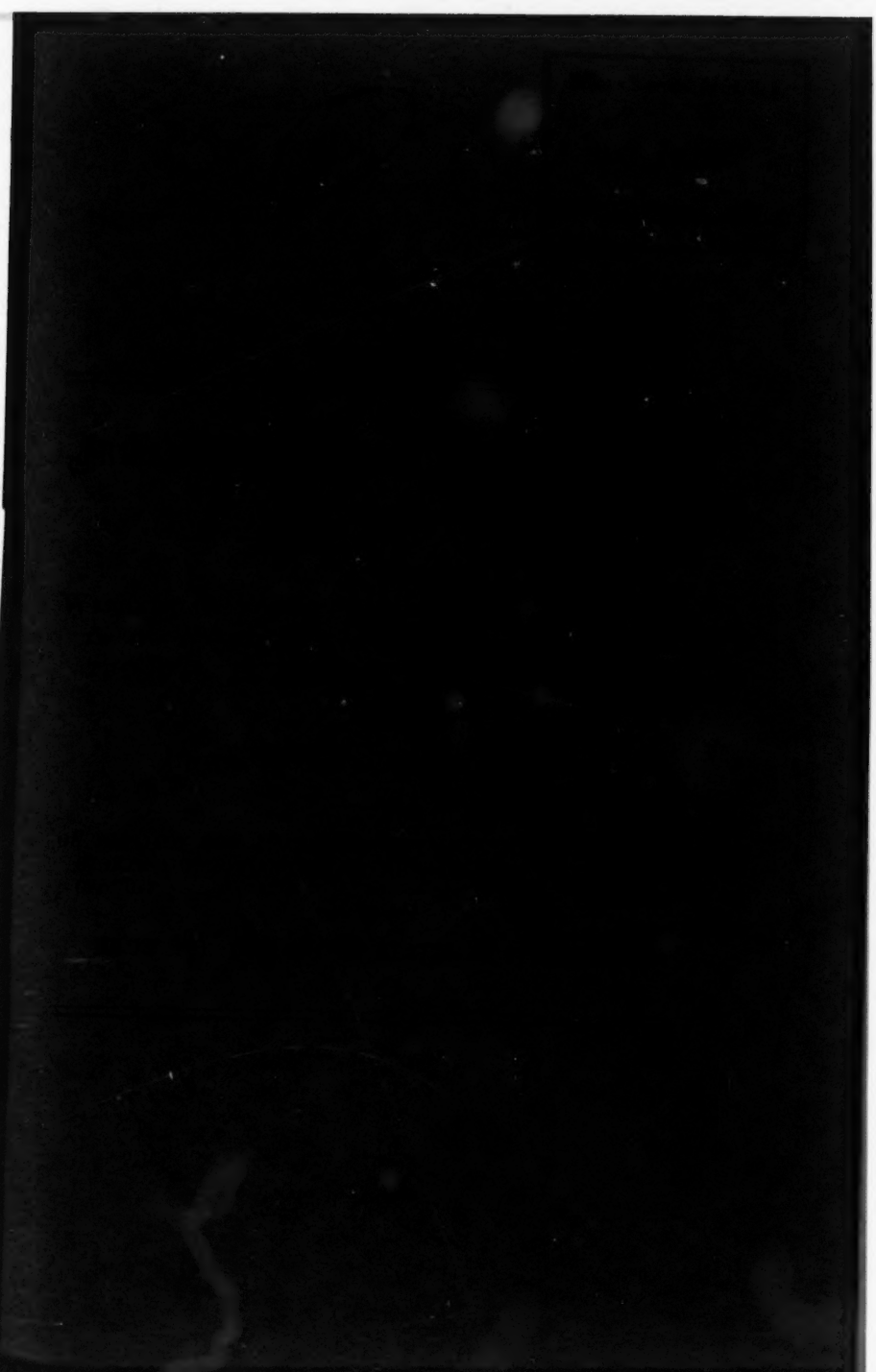

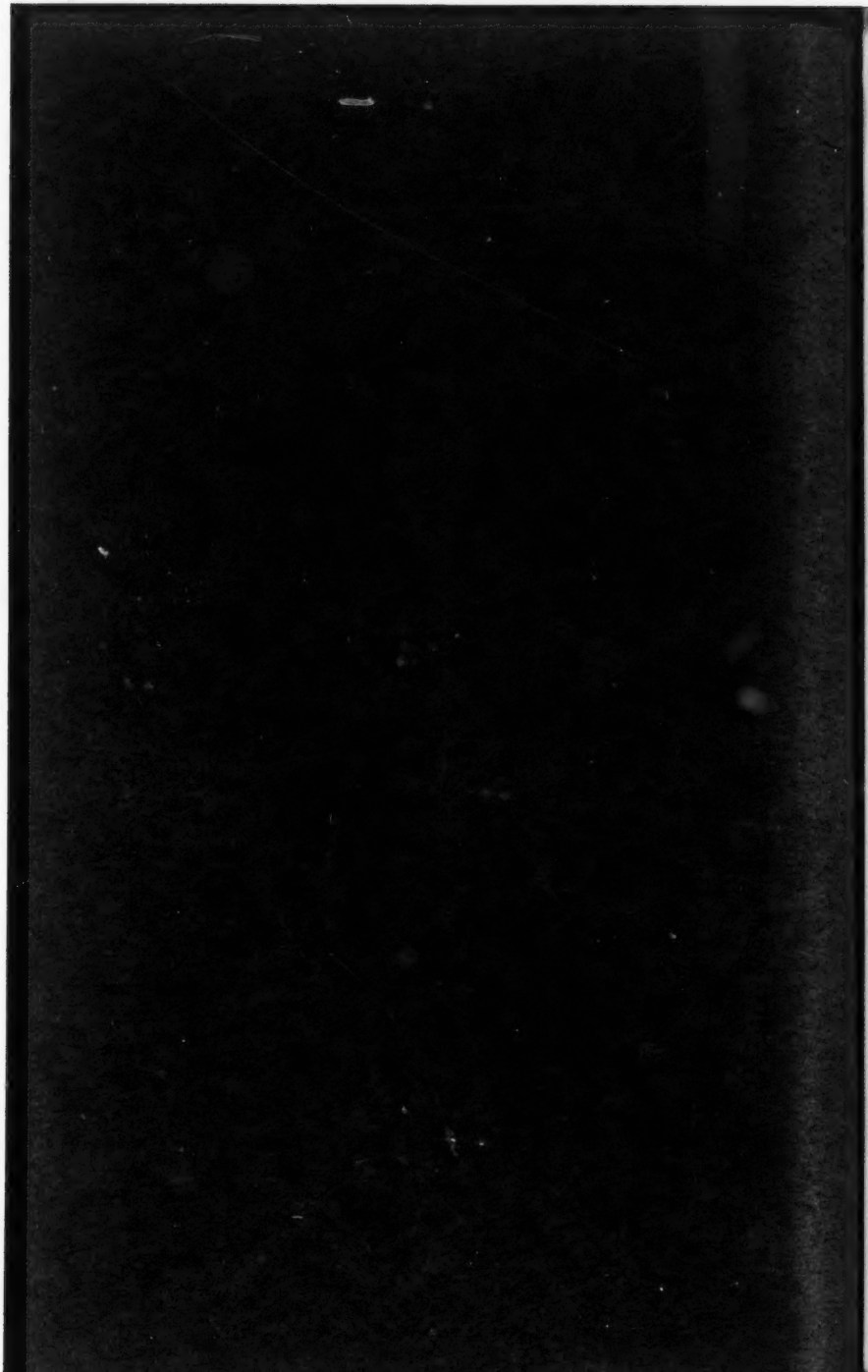

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	9

CITATIONS

Cases:

Brewster v. *Salt River Etc. Assn.*, 27 Ariz. 23	5
Burkart v. *Meiberg*, 37 Colo. 187	5
Garns v. *Rollins*, 41 Utah 260	5
Griffiths v. *Cole*, 264 Fed. 369	5
Hagerman Irr. Co. v. *E. Grand Plains D. D.*, 25 N. M. 649	5
Ickes v. *Fox*, 300 U. S. 82	6
Ide v. *United States*, 263 U. S. 497	5, 7
Lambeye v. *Garcia*, 18 Ariz. 178	5
McKelvey v. *North Sterling District*, 66 Colo. 11	5
Marks v. *Hilger*, 262 Fed. 302	5
Nebraska v. *Wyoming*, No. 7 Original, this Term	8
Ramshorn Ditch Co. v. *United States*, 269 Fed. 80	5, 6
United States v. *Haga*, 276 Fed. 41	5

Statutes:

Reclamation Act of June 17, 1902, c. 1093, sec. 8, 32 Stat. 388 (43 U. S. C. sec. 383)	2

Miscellaneous:

1 Pomeroy, *Equity Jurisprudence* (4th ed., 1918), sec. 398, p. 729	9

460254—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1174

WARDNER G. SCOTT, STATE ENGINEER AND HEAD OF THE DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court delivered no opinion. The opinions of the Circuit Court of Appeals (R. 729–751, 769–770) are reported in 124 F. (2d) 850 *sub nom. United States* v. *Tilley.*

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 23, 1941 (R. 751–752). A petition for rehearing

filed by petitioner was denied on January 28, 1942 (R. 771). The petition for writ of certiorari was filed April 24, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the return flow of appropriated waters from lands within a government irrigation project may be collected by the United States as appropriator and applied to further beneficial use upon other lands within the same project.

STATEMENT

In 1904, pursuant to the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, the United States initiated the North Platte Irrigation Project to irrigate lands in Wyoming and Nebraska with water from the North Platte River (R. 233). In operating its plan, the Government diverts water from the river into the canal of the Interstate Division of the project (R. 234).[1] The Interstate lands are traversed by several drains which carry off the return flow of drainage and seepage waters. These drains cross the canal of the Farmers' Irrigation District (hereinafter referred to as the district), which is not a part of

[1] The Nebraska lands of the Interstate Division have been incorporated into the Pathfinder Irrigation District, a Nebraska corporation (R. 235–236).

the North Platte Project (R. 236–237). The canal of the Northport Division of the project has its headgate on the district's canal (R. 234–235) and, by contract of August 10, 1915, the district agreed to carry to the Northport headgate waters owned by the United States (R. 238, 720).

The district has a Nebraska appropriation with a priority date of September 16, 1887 (R. 237). The United States has a Nebraska appropriation with a priority date of September 19, 1904 (R. 235). This appropriation covers the lands of the Interstate and Northport divisions (R. 463–464).

Several years before institution of the present suit, the Nebraska Department of Roads and Irrigation, of which petitioner Scott is now head, initiated the practice of permitting "optional diversion" by appropriators of water. Under this practice, an appropriator may take drainage and seepage waters in lieu of natural flow and *pro tanto* satisfy his appropriative rights. (R. 240.) In the spring of 1936, the district insisted on taking water from the Interstate drains in satisfaction of its 1887 appropriation and refused to honor the demand of government officers that under the contract with the United States the district should carry this water to the headgate of the Northport canal. Petitioners sustained the district's claim on the ground that the rule of optional diversion was applicable. (R. 502–503, 508, 540, 555.)

In November 1937, the United States brought this action to enjoin petitioners from permitting the district to take the return-flow waters (R. 1–31).[2] The District Court of the United States for the District of Nebraska dismissed the complaint (R. 275) on the ground that these drainage and seepage waters were public waters of Nebraska and hence appropriable by the district (R. 257–258). The Circuit Court of Appeals reversed (R. 751–752).

ARGUMENT

1. The waters in controversy are derived from water diverted to the lands of the Interstate Division by the United States. These diversions are made pursuant to a Nebraska appropriation which covers not only the Interstate Division but also the Northport Division. Petitioners maintain that drainage and seepage waters, in return flow, belong to the stream from which they were taken and are not at the disposal of the appropriator for whose lands they were first diverted (Pet. 20). The Circuit Court of Appeals, however, held that under Nebraska law an appropriator of waters is entitled—after applying them

[2] The complaint also asked other relief, against the district, upon the basis of a contract entered into August 20, 1912, between the Government and the district's predecessor. Upon this issue the court below held against the Government (see R. 730–740). As the opinion states (R. 730), the Government's case against the district was distinct from its complaint against the state officers.

to land—to collect the drainage and seepage for further use upon other land covered by the appropriation (R. 741). In so holding, the court adhered to the view of Nebraska law enunciated by it in *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80, 83. It pointed out that the *Ramshorn* decision had not been questioned by the courts or legislature of Nebraska and that a decision and statute in that state confirmed the view that an appropriator is granted the fullest possible beneficial use of the waters of his appropriation (R. 742, 744).[3]

---

[3] Petitioners mistakenly assert (Pet. 20–21) that the rule for which they contend prevails in the majority of irrigation states. On the contrary, as the Circuit Court of Appeals pointed out (R. 741), the rule of the *Ramshorn* case is generally applied. See, *e. g., Ide* v. *United States*, 263 U. S. 497, 505; *United States* v. *Haga*, 276 Fed. 41, 43 (D. Idaho); *Griffiths* v. *Cole*, 264 Fed. 369, 373–374 (D. Idaho); *McKelvey* v. *North Sterling District*, 66 Colo. 11, 14–15; *Lambeye* v. *Garcia*, 18 Ariz. 178, 183; *Brewster* v. *Salt River Etc. Assn.*, 27 Ariz. 23, 38–39; *Burkart* v. *Meiberg*, 37 Colo. 187, 189; *Garns* v. *Rollins*, 41 Utah 260, 266–271; *Hagerman Irr. Co.* v. *E. Grand Plains D. D.*, 25 N. M. 649, 656–657.

Petitioners assert a conflict between the decision below and a decision of the Circuit Court of Appeals for the Ninth Circuit (Pet. 13, 21, 27–29); they rely on *Marks* v. *Hilger*, 262 Fed. 302 (C. C. A. 9). That case, however, merely held that a junior appropriator could not justify a diversion *in excess of his appropriation* on the ground that a senior appropriator could receive enough water by taking the drainage waters therefrom, *i. e.*, that one having the right to appropriate natural flow could not be compelled to take instead drainage waters.

Abandoning their efforts to distinguish the *Ramshorn* case (cf. argument below, R. 743–747; petition for rehearing, R. 762–763), petitioners do not mention it in their petition for certiorari. They concede (Pet. 19) that there is no Nebraska decision on the question. It is obvious, therefore, that there is no merit in petitioners' contentions that the decision is in conflict with Nebraska law (Pet. 11–12, 17–21) and that it fails to give effect to the direction of section 8 of the Reclamation Act, c. 1093, 32 Stat. 390 (43 U. S. C. sec. 383), that the Secretary of the Interior in carrying out the provisions of the statute shall proceed in conformity with local irrigation laws (Pet. 11, 13–14, 29–30).

2. Petitioners also assert (Pet. 12–13, 23, 25–26) that the United States does not *own* the waters or the rights in the waters which are diverted from the river for the North Platte project, and that therefore the Government is not entitled to dispose of the return flow. They urge that the decision of the Circuit Court of Appeals, holding that the United States may dispose of the drainage and seepage waters, conflicts with *Ickes* v. *Fox,* 300 U. S. 82. The Court there held that in suits to enjoin the Secretary of the Interior from depriving landowners in an irrigation project of water rights, obtained by contract from the Government, the United States was not an indispensable party because the suits had been brought on the theory that the Secretary had acted beyond

the scope of his authority. While the opinion states that the landowners rather than the Government owned the water rights in question (300 U. S. 94–96), the case was not concerned with the Government's interest in appropriated waters beyond the existence of the vested right of the landowners as against the United States in those waters.

An earlier decision, *Ide* v. *United States,* 263 U. S. 497, established specifically that the Government retains the right to collect drainage and seepage for use again after waters appropriated by the Government for an irrigation project have once been used by landowners. There the Court said:

> A further contention is that the plaintiff [the United States] sells the water before it is used, and therefore has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. *Beyond this all rights incident to the appropriation are retained by the* plaintiff. * * * [263 U. S. at 505–506.] [Italics supplied]

So here, the United States, while investing purchasers of water on the lands of the Interstate

Division with rights to use the water in cultivation of the lands, retains the right to dispose of the drainage and seepage for the benefit of the Northport Division.

3. Petitioners make the further contention (Pet. 9, 11, 15–16, 31–34) that the court below erroneously refused to consider their defense that the Government had come into court with unclean hands. However, petitioners did not make out the defense. They merely offered in evidence an exhibit prepared by a witness for the State of Nebraska in *Nebraska* v. *Wyoming,* No. 7 Original, this Term, which was designed to show the quantities of water taken from the North Platte River in Wyoming by the United States during periods when there were unsatisfied demands of Nebraska appropriators claiming an earlier priority date in Nebraska than that of the Government's Wyoming appropriation (R. 594–596).[4] Whether these takings were illegal depends upon whether Wyoming appropriations are subordinate to Nebraska appropriations of an earlier date, and that question is an issue in the original suit in this Court. The questions in issue there were eliminated from the present case by the District Court (R. 294–

[4] The United States also has a Wyoming appropriation with a priority date of December 6, 1904 (R. 235). However, the present suit was presented to the District Court on the theory that the Government's right to the drainage and seepage waters rested on the Nebraska appropriation (R. 292).

295; see R. 770). Consequently, despite petitioners' implication to the contrary (Pet. 31, 32), the District Court did not decide this question in their favor. It merely found that the Government's diversions were "out of priority" (R. 246), and left undecided whether they were inequitable or even illegal. Obviously the finding fell far short of a holding that the United States came into court with unclean hands, *i. e.,* that its conduct was "unconscientious or unjust, or marked by a want of good faith or * * * [in violation of] any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain." See 1 Pomeroy, *Equity Jurisprudence* (4th ed., 1918), sec. 398, p. 739. Accordingly, the Circuit Court of Appeals rightly held (R. 769–770) that there was no basis for the view that the United States by its conduct had debarred itself from equitable relief herein.

CONCLUSION

The decision below is correct, and presents no conflicts. It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
JOHN F. COTTER,
Attorney.

MAY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942